

1998

State of Utah v. Paul Anthony Cerroni : Brief of Appellant

Utah Court of Appeals

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Attorney General Office; Appellate Division, Attorney for Appellee.

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IN THE UTAH COURT OF APPEALS

| | | |
|----------------------|---|--------------------|
| STATE OF UTAH, | : | Case No: 980217-CA |
| | : | |
| Plaintiff/Appellee, | : | |
| | : | |
| vs. | : | |
| | : | Priority No: 2 |
| PAUL ANTHONY CERRONI | : | Defendant Not |
| | : | Incarcerated |
| | : | |
| Defendant/Appellant. | : | |

BRIEF OF APPELLANT

APPEAL FROM A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE
THIRD JUDICIAL DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH
THE HONORABLE L.A. DEVER PRESIDING

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UTAH COURT OF APPEALS
BRIEF

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Utah Court of Appeals
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Julia D'Alesandro
Clerk of the Court

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BRIEF OF APPELLANT

APPELLATE JURISDICTION

Jurisdiction to hear this appeal is conferred upon the court of appeals pursuant to Utah Code Ann. §78-2A-3(2)(e). Cerroni also appeals as a matter of right under Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. Did the trial court err when it denied Cerroni's Motion to Suppress and erroneously found the search legal and consented to by Cerroni? When reviewing a trial court's decision to grant or deny a motion to suppress, this court will uphold the trial court's underlying findings of fact unless they are clearly erroneous. State v. Lopes, 552 P.2d 120, 121 (Utah 1976); State v. Bradford, 839 P.2d 866, 868 (Utah App. 1992).

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STATEMENT OF THE CASE

A. NATURE OF THE CASE:

Appellant (hereinafter "Cerroni") entered a plea of guilty to possession of a controlled substance on January 21, 1998, in violation of Utah Code Ann. §58-37-8(2)(a)(i). Cerroni entered this plea after an Order denying Cerroni's Motion to Suppress was entered in the trial court on April 13, 1998, and signed Nunc Pro Tunc to August 25, 1997. The plea was conditioned upon an appeal being filed on the Order of the Court denying the Cerroni's Motion to Suppress. In the event that Cerroni's appeal is successful his plea will be set aside. Cerroni was sentenced on March 9, 1998. Cerroni is now appealing that Order because of the arguments contained herein.

B. COURSE OF PROCEEDINGS:

Appellant filed and argued a Motion to Suppress. An Order denying the Motion was entered in the trial court. Appellant then entered a plea of guilty conditioned upon appealing the Order.

C. DISPOSITION IN THE TRIAL COURT:

The trial court heard argument on the Motion to Suppress and entered an Order denying Defendant's Motion. The trial court accepted a plea of guilty and sentenced Defendant. Defendant is not incarcerated at this time.

D. STATEMENT OF THE FACTS:

On or about September 21, 1996, Appellant (hereinafter "Cerroni") was stopped by Utah Highway Patrol Officer Bruce Graham (hereinafter "Graham") for an alleged equipment violation. Graham alleged that he stopped Cerroni because the rear license plate on Cerroni's vehicle was not illuminated, the right tail light was inoperable, and the reverse lights in the rear of the vehicle were broken off and there were no light bulbs in them. (Transcript of Motion to Suppress at 6; hereinafter "Motion to Suppress"). Graham's patrol vehicle was parked perpendicular to Cerroni's path of travel. (Motion to Suppress at 6). In other words, Graham was able to see intricate details on the rear of Cerroni's vehicle, such as a cracked tail light cover and missing reverse light bulbs, when it was traveling by his parked vehicle late at night. It is interesting that Graham testified that he could see that the reverse lights' bulbs were missing even though Cerroni was not driving in reverse.

Graham then pulled his vehicle behind and followed Cerroni for a distance of two to four blocks and effectuated a stop of Cerroni's vehicle. (Motion to Suppress at 7:46). Following the stop, Graham approached the driver's side of Cerroni's vehicle and testified that he saw a number of open containers of alcohol inside the vehicle. (Motion to Suppress at 7:8)

Graham testified that he asked Cerroni to exit and walk to the rear of his vehicle for "two reasons: One to check for Driving

Under the Influence of alcohol or drugs, and number two, to search for and retrieve the open containers." (Motion to Suppress at 8).

Graham never investigated the open containers in the back of Cerroni's vehicle. Graham testified that the reason he told Cerroni to step from his vehicle was to "check [Cerroni] for Driving Under the Influence and to search for and retrieve the open containers"; Graham never investigated either of these allegations. Once Graham learned that Cerroni was not driving under the influence or decided not to further investigate driving under the influence, Cerroni should have been free to leave.

Graham testified that as Cerroni was walking to the rear of the vehicle, he informed Cerroni that he was going to pat him down to make sure that he had no weapons. (Motion to Suppress at 8). Graham did this without any belief that Cerroni was armed and presently dangerous. Graham's own testimony confirms this when he stated that he knew that it was a watch in Cerroni's front pocket. (Motion to Suppress at 10). At the Suppression Hearing, Graham denied that he performed a Terry frisk on Cerroni. (Motion to Suppress at 17). He testified that Cerroni just voluntarily pulled the watch from his pocket when Graham asked him what it was. (Motion to Suppress at 17). This testimony, however, was directly contradicted by another officer that arrived to back-up Graham.

Officer John Michael McMahon (hereinafter "McMahon") testified that when he arrived on the scene, Graham was standing near the driver's side window of Cerroni's vehicle. (Motion to

Suppress at 24). Shortly after McMahon's arrival, Cerroni was asked to exit the vehicle. (Motion to Suppress at 24). McMahon testified that as Cerroni was walking to the rear of the vehicle, Graham began to pat him down. (Motion to Suppress at 25:33).

According to McMahon's testimony, just prior to the time Graham began patting-down Cerroni, Graham asked Cerroni if he had arrested him before for marijuana. (Preliminary Hearing Transcript at 7). Cerroni responded that he had not been arrested by Graham for marijuana in the past. Id. Graham then looked at McMahon and stated, "I believe we have arrested him before." (Motion to Suppress at 32). Graham also testified that he continuously asked Cerroni if he had arrested him before. (Motion to Suppress at 17, 18).

McMahon also testified that he knew the item in Cerroni's pocket was not a weapon. (Motion to Suppress at 33:34) He could clearly see that it was round and sticking out of the pocket roughly an inch--nothing that could have been a weapon. Moreover, McMahon never felt threatened or in danger during the stop of Cerroni. (Motion to Suppress at 33). This clearly demonstrates that neither officer felt that Cerroni posed any threat to either of them.

McMahon testified that Graham had informed him that he had video taped the incident with his dash mounted video camera and had reviewed the video in preparation for the Preliminary Hearing. (Preliminary Hearing Transcript at 13; Motion to Suppress at 36-38). This video would have shown the condition of Cerroni's

vehicle at the time of the stop, as well as the pat-down search performed by Graham. This video was never produced by the State during Discovery. Graham later testified that he did not believe that he recorded the incident. (Motion to Suppress at 20). He later admitted, however, that he may have given the tape to the UHP secretary and did not know why it was not available. (Motion to Suppress at 21). The only tape made available to Cerroni was the tape made by McMahon after Cerroni had been arrested and placed in the back of McMahon's vehicle. This tape did show the back of Cerroni's vehicle, but the license plate is not visible because of an intercoding device. (Motion to Suppress at 42, 43). This blurred section of the video screen is positioned exactly on top of the license plate and tail lights. (Motion to Suppress at 42, 43).

Graham testified that as Cerroni pulled the watch from his pocket, a baggy of what was later determined to be methamphetamine, was pulled out at the same time. (Motion to Suppress at 10). Graham reached for the baggy and pulled it out of Cerroni's pocket. (Motion to Suppress at 10). At that point Graham turned the investigation over to McMahon, and a short time after that Cerroni was arrested for possession of a controlled substance.

SUMMARY OF THE ARGUMENT

It is clear from the Record that Utah Highway Patrol Officer Bruce Graham stopped Appellant for an alleged equipment violation with no probable cause or a reasonable articulable suspicion that

Appellant was violating any laws. There was evidence presented that the officer had made a video recording of the stop and that the State failed to produce the video during Discovery. Had the State produced the video tape of the stop, Appellant's assertion that the stop was not valid would have been clear at the Suppression Hearing. It is clear that the officer had an ulterior motive for the stop when he continuously asked Appellant if he had arrested him before for possession of marijuana. Because the stop was not justified at its inception, any evidence derived from the stop should have been suppressed by the trial court.

Graham did not have a reasonable, articulable suspicion that Appellant was armed and presently dangerous. Graham's own testimony indicates that he did not suspect that Appellant had anything more than a watch in his pocket. Without such a suspicion, Graham had no right to perform a Terry frisk--in fact, no right to have even touched Appellant. Furthermore, even if a proper and legal Terry frisk had been performed, once the officer was assured there was no safety threat he could not inquire any further into the pocket watch. Therefore, Appellant argues that his Fourth Amendment rights were violated and that the evidence found during the illegal search should have been suppressed.

ARGUMENT

POINT I

UTAH HIGHWAY PATROL OFFICER BRUCE GRAHAM DID NOT HAVE PROBABLE CAUSE OR A REASONABLE, ARTICULABLE SUSPICION TO STOP APPELLANT'S VEHICLE

The Fourth Amendment to the United States Constitution

guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..." U.S. Const. Amend. IV. The United States Supreme Court has held that "stopping an automobile and detaining its occupants constitute[s] a seizure within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention is quite brief." Accord State v. Talbot, 792 P.2d 489, 491 (Utah App. 1990) (Fourth Amendment rights apply to traffic stops "regardless of the reason for the stop or the brevity of the detention").

In order to determine whether an officer complied with the Fourth Amendment, this Court will make a dual inquiry: (1) Was the police officer's action 'justified at its inception'? And (2) Was the resulting detention 'reasonably related in scope to the circumstances that justified the interference in the first place'?" State v. Lopez, 873 P.2d 1127, 1131-1132 (Utah 1994) (quoting Terry v. Ohio, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 1879 (1968)).

In State v. Matison, 875 P.2d 584, 587 (Utah App. 1994), the court held that the stop of the defendant's vehicle was not 'justified at its inception,' and was therefore in violation of the protections afforded by the Fourth Amendment.

The defendant in Matison was stopped after a deputy sheriff witnessed his vehicle "fishtail" while exiting an interstate road. The officer testified that he did not stop the defendant initially, but rather waited some time and then stopped the

vehicle to investigate why he had fishtailed. The Court held that the officer's actions were not justified at the inception of the stop, and thus the first prong was not satisfied, and therefore the stop was illegal.

The second question under the dual inquiry asks whether the resulting detention was reasonably related in scope to the circumstances that justified the interference in the first place. In Matison, the Court held that "[O]nce a traffic stop is made, the detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" Id. (Quoting Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325 (1983)). The Court continued by quoting its previous decision in State v. Robinson, 797 P.2d 431 (Utah App. 1990) (Discussing the permissible length and scope of a traffic stop):

An officer conducting a routine traffic stop may request a driver's license and vehicle registration, conduct a computer check, and issue a citation. However, once the driver has produced a driver's license and evidence of entitlement to use the vehicle, 'he must be allowed to proceed on his way, without being subjected to further delay by police for additional questioning.'

(quoting United States v. Guzman, 864 F.2d 1512, 1519 (10th Cir. 1988))

The Court continued by restating the principle found in Lopez, supra,

regarding further detention by the police:

'Investigative questioning that further detains the driver must be supported by reasonable suspicion of more serious criminal activity. Reasonable suspicion means suspicion based on specific, articulable facts drawn from the totality of the circumstances facing the officer at the time of the stop.'

(accord State v. Mendoza, 748 P.2d 181, 183 (Utah 1987)).

The case at bar presents this Court with a similar situation it faced in Matison, supra. Cerroni was not stopped based on probable cause or a reasonable, articulable suspicion that he had committed any criminal or traffic violations.

Cerroni testified that he drove by Graham, late at night, while his vehicle was parked perpendicular to his path of travel. (Motion to Suppress at 6). In spite of the darkness and the direction he was facing, Graham testified that he could see that the reverse light covers at the rear of the vehicle were broken off and that there were no light bulbs in them, that the right tail light was inoperable, and the rear license plate was not illuminated. Id. Graham then pulled his vehicle behind and followed Cerroni for approximately four blocks and effectuated a stop of Cerroni's vehicle. Id. Cerroni asks this simple question to the Court: assuming arguendo, that the reverse-lights' bulbs were missing, how could Graham have seen this at night if Cerroni was not driving in reverse? Cerroni also argues that his rear license plate was illuminated.

As further evidence that Graham stopped Cerroni for reasons other than traffic violations, Cerroni testified that immediately after he rolled down his window Graham informed him that he knew him. (Motion to Suppress at 47). Both McMahon and Graham admitted Graham recognized Cerroni from a prior marijuana arrest.

One of the officers that was present during the traffic stop

(McMahon) testified that Graham informed him that he had reviewed the video of the Cerroni stop that he had made with his dash-mounted video camera. (Preliminary Hearing at 13). In fact, McMahon testified that Graham had informed him that he had reviewed the tape to figure out when he had asked Cerroni if he had arrested him before. (Preliminary Hearing Transcript at 17). During cross-examination, Graham was very evasive about the video tape. He testified that he is not certain if one was made or if one was what ever became of it. Again, McMahon clearly recalled that Graham had informed him that he had reviewed the tape. (Preliminary Hearing Transcript at 13, 17: Motion to Suppress at 36-38).

The State, however, failed to furnish Cerroni with this video during Discovery, claiming that Graham never made a video of the stop. Had Cerroni been furnished with the video during Discovery, it would clearly show that his rear license plate was illuminated, and that the crack in the tail light did not show any white light.

It is interesting to note that Graham never investigated the reason he told Cerroni to exit the vehicle in the first place--namely suspected Driving Under the Influence. Cerroni does not argue that Graham had the right to investigate the alleged open container of alcohol in the vehicle. Cerroni does argue, however, that Graham never did investigate. Graham simply commanded Cerroni to exit the vehicle and began patting-down his clothing.

Graham's stop of Cerroni's vehicle was not justified at its inception. It is clear from Graham's testimony that he did not

have probable cause or a reasonable, articulable suspicion that Cerroni was committing or had committed any criminal or traffic violations. Production of the video during discovery by the State would have shown that the stop was not justified. Because the stop was tainted from the inception, the evidence derived in violation of Cerroni's Fourth Amendment rights should have been suppressed by the trial court.

POINT II

OFFICER GRAHAM HAD NO RIGHT TO CONDUCT A PAT-DOWN SEARCH OF CERRONI

The United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 27 (1968), refused to sanction any intrusion based on nothing more substantial than "inarticulate hunches." Rather, a police officer must, prior to instituting a frisk, reasonably conclude in light of his experience that the unusual conduct he observes might suggest danger. Id. At 30.

The *Terry* Court held that a frisk was reasonable under certain circumstances. Those circumstances include: (1) "where a police officer observes unusual conduct" which he interprets "in light of his experience" as indicating possible criminal activity and present danger, (2) "where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and (3) where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or other's safety." (FN5) *Id.* At 30, 88 S.Ct. At 1884. The Court stated that while different circumstances may require modification

of the Terry components, the lawfulness of every frisk remains subject to the "central inquiry under the Fourth Amendment--the **reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.**" Id. At 19, S.Ct. At 1878-79 (emphasis added).

Prior to instituting a frisk, a police officer must conclude in light of his experience that the unusual conduct he observes might suggest criminal activity and danger. Id. At 30, S.Ct. At 1884. The officer does not need to base his conclusion that a suspect is armed on absolute certainty, id. At 27, 88 S.Ct. At 1883, but rather depends on "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (FN6) Id. An officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. At 21, 88 S.Ct. At 1880.

In State v. Trujillo, 739 P.2d 85, 89 (Utah App. 1987), the court found the search performed by a police officer to be unconstitutional. In that case, the officer had seen the defendant and two companions walking down the street. The officer approached the trio and asked for their names and identification. After supplying the officer with their names, the officer began patting-down the defendant. The officer discovered a knife strapped to the chest of defendant and he was subsequently charged with possession of a dangerous weapon by an unauthorized person.

The court held the search unconstitutional [s]ince

Officer Beesley did not articulate reasonable objective facts for suspecting [defendant] had engaged in or was about to engage in criminal conduct, the balance between the public interest in crime prevention and [defendant]'s right to personal security and privacy tilts to protect [defendant] from this unreasonable police interference. Officer Beesley's detention of [defendant] was unreasonable within the meaning of the fourth amendment. Inasmuch as we hold the seizure of [defendant] unconstitutional, Officer Beesley had no right to conduct a pat-down search of [defendant] and, therefore, the knife should have been suppressed on [defendant]'s motion.

Id. At 90.

During the Motion to Suppress Hearing, Graham never testified that he observed any unusual conduct that might suggest, to a reasonable officer, that Cerroni was a danger to Graham or anyone else. Graham testified to the following regarding the stop and frisk:

(Beginning at P. 8 L. 6)

Q: All right. Upon obtaining the registration, what did you do then?

A: I asked Mr. Cerroni if he had been consuming alcohol tonight, and he immediately became hostile, he was saying things like...I hadn't accused him of anything, just asked him for a license and registration. At that point I asked him to exit the vehicle for two reasons: One to check for Driving Under the Influence of alcohol or drugs, and number two, to search for and retrieve the open containers.

Q: All right, and did he exit the vehicle?

A: He did. He exited the vehicle and came towards the back of the car.

Q: All right.

A: At that point I told him that I was going to pat him down to make sure he had no weapons. (Emphasis added).

(Continued at P. 9 L. 23)

Q: What happened next?

A: After I made my intentions known to pat him down and search for weapons, he immediately pulled on a chain in his pocket and said, "All I have is this." And my attention was immediately drawn to the pocket as he was reaching for something.

Q: And were you able to see anything in there, in the pocket?

A: I just saw the chain come out and it had a watch on it.

Q: All right.

A: At that point--

Q: Had it created any noticeable bulge in his pocket you observed?

A: Yeah, **that was a watch in his right front pocket.** (Emphasis added)

According to the Terry Court, in order to justify a search for weapons, an officer must first witness unusual conduct which may indicate possible criminal activity and present danger. See, Terry at 30. Graham never mentioned that he felt that his own or other's safety was ever threatened at the time he told Cerroni to exit his vehicle. In fact, Graham testified that he knew the object in Cerroni's right front pocket looked like a watch. (Motion to Suppress at 10). McMahon testified that he did not feel that his or Graham's safety was ever in jeopardy--McMahon clearly described the item during the Suppression Hearing as a small, round object that stuck out possibly an inch. (Motion to Suppress at 33). McMahon also testified that Graham **did** perform a Terry frisk of Cerroni. Id. Had Graham had a reasonable belief that Cerroni was about to commit a crime and Graham felt threatened, according to the law stated above, Graham was required to stop the search once he was satisfied Cerroni was not armed.

It is clear that no reasonable officer would have concluded that there was any present danger, and the search, therefore, was in violation of Cerroni's Fourth Amendment rights and the evidence derived from the unconstitutional search should have been suppressed by the trial court.

POINT III

CERRONI DID NOT VOLUNTARILY CONSENT TO PULL THE WATCH FROM HIS POCKET

The Utah Supreme Court has described a number of factors that should be considered when determining whether there has been duress or coercion in obtaining a consent to search. In State v. Whittenback, 621 P.2d 103, 106 (Utah 1980), the Court stated:

Clearly the prosecution has the burden of establishing from the totality of the circumstances that the consent was voluntarily given; however, the prosecution is not required to prove that the defendant knew of his right to refuse to consent in order to show voluntariness. Factors which may show a lack of duress or coercion include: (1) the absence of a claim of authority to search by the officers; (2) the absence of an exhibition of force by the officers; (3) a mere request to search; and (4) the absence of deception or trick on the part of the officer. [Footnote omitted]

In the case at bar, it is clear that Cerroni did not voluntarily pull the watch from his pocket. Graham was performing an illegal Terry frisk of Cerroni just seconds after Cerroni exited his vehicle. This show of force by the officer placed Cerroni in a position that was akin to being under arrest. Cerroni was clearly not free to leave at the time he was being patted down by the officer. Coupled together, any reasonable person would have interpreted the officers direction as a command

and not merely an inquiry.

The officer performed the frisk even though he had no reason to believe that Cerroni was presently dangerous. Because the officer did not have any reasonable belief of this, it is clear that the frisk should not have taken place. But for the illegal conduct of the officer, Cerroni would never have pulled the watch from his pocket, and thus the drugs that were found during the illegal stop and search should have been suppressed by the trial court.

POINT IV

OFFICER GRAHAM HAD NO RIGHT TO INQUIRE ABOUT THE OBJECT IN CERRONI'S POCKET ONCE HE WAS CONVINCED IT WAS NOT A WEAPON

In State v. Chapman, 921 P.2d 446, 453 (Utah 1996), the Court held that an officer cannot expand the scope of detention without independent facts of illegal conduct.

The defendant in that case was stopped by an officer for loitering in a parking lot while he was sitting in a car with a friend. The officer testified that he initially stopped the defendant because he felt they were violating the loitering ordinance. Another officer arrived and the defendant was then asked to step from the car so he could be checked for weapons. Id. At 448.

Once the defendant was "outside of the vehicle and known to be unarmed, however, the officers had no reasonable, articulable suspicion either to continue questioning him regarding weapons or to search for them." Id. At 453. The Court stated that once the

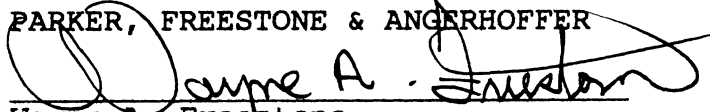
officers learned that the defendant was unarmed, any further questioning was beyond the scope of his detention in the first place--violating the loitering ordinance. Id. At 454.

Graham exceeded the scope of the Terry frisk when he inquired about the object in the front pocket of Cerroni's pocket. Once Graham learned that Cerroni was unarmed and posed no threat to either himself or to McMahon, the inquiry should have stopped. It is clear from the Record that both officers knew it was a watch and not a weapon in the front pocket of Cerroni's pants. Therefore, it was improper for Graham to inquire further about the object.

CONCLUSION

Cerroni's right to be free from unreasonable searches and seizures was grossly violated when he was stopped by Utah Highway Patrolman Bruce Graham. Graham had no probable cause or a reasonable, articulable suspicion to stop Cerroni, and therefore the stop was not justified at its inception. Moreover, Graham had no reason to believe that Cerroni was presently dangerous, and thus the search performed by Graham was unconstitutional. This Court should remand this case with instructions that the evidence derived during the illegal stop and search be suppressed.

DATED this 24 day of June, 1998.

PARKER, FREESTONE & ANGERHOFFER

Wayne A. Freestone
Attorney for Defendant/ Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of June, 1998, I caused to be mailed, First-Class Mail, postage prepaid, a true and correct copy of the forgoing Appellant's Brief to the following:

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No addendum is necessary for this brief.